IN THE MATTER

OF THE

FORFEITURE OF THE AUTOMATIC TELEPHONE SYSTEM

OF THE

CHICAGO TUNNEL COMPANY.

1915

OPINION

RENDERED THE COMMITTEE ON GAS, OIL AND ELECTRIC LIGHT OF THE CITY COUNCIL OF THE CITY OF CHICAGO

JULY 1, 1915

By

STEPHEN A. FOSTER

Special Counsel for the Committee

TABLE OF CONTENTS.

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LAWYERS
MONADNOCK BLOCK
CHICAGO

RUSH C. BUTLER
WILLIAM E. LAMB
STEPHEN A. FOSTER
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July 1, 1915.

Hon. Lewis D. Sitts, Chairman, and Members of the Committee on Gas, Oil & Electric Light, City Hall, Chicago.

IN THE MATTER OF THE FORFEITURE OF THE AUTOMATIC TELEPHONE SYSTEM OF THE CHICAGO TUNNEL COMPANY.

GENTLEMEN:

At the meeting of the Committee held Thursday, June 24th, 1915, a motion was passed requesting me specifically to answer questions 1 and 3 that had been propounded by his Honor, the Mayor, to Mr. Walter L. Fisher and by your Committee to me in your letter of June 21st. I was by the action of the Committee on June 24th excused from replying to the other three questions propounded to Mr. Fisher and which may be described generally as questions of policy and was requested to direct my attention particularly to the legal questions involved in any action that might be taken by the City Council for the forfeiture of the Automatic Telephone System of the Chicago Tunnel Company.

The preparation of this opinion on the two legal questions propounded to me has involved the examination of all of the printed and typewritten briefs and opinions submitted to this Committee by the former Corporation Counsel and by the attorneys for the Chicago Tunnel Company and its bondholders, and the examination of a

very large number of legal decisions, some of which are cited in this opinion and the footnotes thereto.

In the very limited time at my disposal, owing to constant engagements in court since the date of my being retained in this matter, I have been unable to examine the voluminous records of the previous hearings before this Committee, but I assume that the discussions therein contained relate for the most part to questions of policy and that my examination of the printed and typewritten opinions above referred to have sufficiently advised me of all legal contentions made in opposition to the possible forfeiture of the Tunnel Company's franchises and property. The eminence of the attorneys who have rendered these opinions and their well known diligence justify this assumption on my part and my examination of the authorities confirms me in the belief that these attorneys have stated the case against the right to forfeit as strongly as it can be stated.

I have therefore devoted special consideration to the positions taken by them and have sought to determine whether or not their conclusions are justified by the weight of legal authority. I have not had as much time to devote to an examination of the authorities as I might have desired, but my examination has progressed sufficiently to convince me of the controlling force of the principles upon which I rely and the authorities which I cite.

First Question.

Referring then to the questions to which you particularly directed my attention, I would say in answer to the first question which reads as follows:

WHETHER THE CITY COUNCIL CAN LEGALLY FORFEIT THE TELEPHONE FRANCHISES[1] AND TELEPHONE PROPERTY OF THE CHICAGO TUNNEL COMPANY?

that my conclusion is:

THAT IT CAN SO FORFEIT SUCH TELEPHONE FRANCHISES AND TELEPHONE PROPERTY.

In the former Corporation Counsel's opinion of October 2nd, 1914, addressed to you, it is stated:

> "It may be considered as established by the authorities that if an ordinance granted by a city to a public service company authorizing such company to use the streets of the city for the installation of its equipment and the operation of its system, expressly provides in clear and unequivocal terms for forfeiture of the rights granted by the ordinance upon the failure of the company to comply with the conditions specified in the ordinance, then such rights may be forfeited if the company fails to comply with the conditions specified."[2]

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[1]His Honor, the Mayor, uses the word "franchise" in the question propounded to Mr. Fisher in the sense that such word is often used as designating privileges and rights to the use of streets conferred by a municipality. The word "franchise" however has a legal meaning of a somewhat different nature and for example applies to the powers of a corporation derived from the sovereign authority, that is from the state. In considering cases involving grants of privileges or rights in the use of streets given by municipalities to private corporations the Illinois courts frequently make a distinction between the franchise of the private corporation as obtained from the state, namely its charter, and the privileges which are given by the ordinance. *The latter privilege is spoken of as a license, which, on acceptance by the private corporation to which the grant is made, becomes a contract between the municipality and the private corporation.*
See:

Chicago City Railway Co. v. *People*, 73 Ill., 541, 548.
Chicago Municipal Gas Light Co. v. *Town of Lake*, 130 Ill., 42, 55.
City of Belleville v. *Citizens' Horse Railway Company*, 152 Ill., 171, 185.
City of Chester v. *Wabash, Chester & Western Railroad Company*, 182 Ill., 382, 389.
People v. *Central Union Tel. Co.*, 192 Ill., 307, 311.
City of Chicago v. *Rothschild & Co.*, 212 Ill., 590.

[2]In support of the proposition above quoted the former Corporation Counsel cited the following authorities:

City of Belleville v. *Railway Company*, 152 Ill., 171.
Blocki v. *People*, 220 Ill., 444.
People v. *Central Union Tel. Co.*, 232 Ill., 260.

The former Corporation Counsel's opinion goes on to set forth the several ordinances which have been granted to the predecessor of the Chicago Tunnel Company, the Illinois Telephone & Telegraph Company. A summary of these ordinances is set forth below.[3]

Wheeling, etc. R. R. Co. v. *Triadelphia*, 58 W. Va., 487.
Union St. Ry. Co. v. *Snow*, 113 Mich., 694.
Pacific R. R. Co. v. *Leavenworth*, 1 Dill., 393.

To these may be added the following authorities among many others:
Whiting v. *Village of New Baltimore*, 127 Mich., 66.
City of Detroit v. *Peoples' Telephone Co.*, 135 Mich., 696.
People v. *Broadway Railroad Co. of Brooklyn*, 126 New York, 29.
City of Tower v. *Tower & Soudan Railway Co.*, 68 Minn., 500, 38 L. R. A., 541.
Farnsworth v. *Minnesota Railroad Company*, 92 U. S., 49, 23 Lawyers' Edition, 530.
Atlantic & Pacific Railroad Co. v. *Mingus*, 165 U. S., 413.
Palestine Water & Power Co. v. *Palestine*, 91 Texas, 540, 40 L. R. A., 203.
St. Cloud v. *Water Light & Power Co.*, 88 Minn., 329, 92 N. W., 1112.
State v. *Light & Development Company*, 246 Mo., 618.

[3]The first ordinance granted to the Illinois Telephone & Telegraph Co. passed February 20, 1899, gave permission and authority to construct and operate in the streets of the City of Chicago a line of conduits and wires for a telephone system during a period of 30 years. Said ordinance prohibited any sale or agreement by which competition would become inoperative and provided that a certain percentage of the gross receipts of the telephone system be paid to the city as compensation for the privileges conferred. Section 5 provided that on certain conditions the company would forfeit to the city all rights acquired under the ordinance together with its plant, wires, poles and conduits then in the streets. The condition of this forfeiture was the failure of the company to have in operation within five years from date of the ordinance a telephone exchange serving 2,000 telephones of bona fide subscribers.

By the ordinance of July 15, 1903, said company was granted permission and authority to construct and operate in and through tunnels already constructed under the terms of the ordinance of February 20, 1899, or which would thereafter be constructed under said ordinance of July 15, 1903, for and during the term of the ordinance of February 20, 1899, not only wires and electrical conductors as provided in said last mentioned ordinance but also any appliances or apparatus for the transmission or transportation of newspapers, mail matter, packages, parcels or merchandise. This ordinance contained provision for the payment of compensation to the city for the privileges conferred of a certain percentage of the gross receipts from the transportation business. Section 4 gave to the company authority to lease space in the tunnels to such persons or corporations as might be designated by the city. This ordinance was amended in minor changes in phraseology by the ordinance of July 20, 1903, passed five days later.

Section 11 of the above ordinance of July 15, 1903, provided that the company should under certain conditions forfeit all rights acquired under said ordinance together with its plant and equipment for transportation purposes and that under certain conditions the company should forfeit to the city all rights acquired under said ordinance of February

The Forfeiture Clauses.

As the former Corporation Counsel points out, the provision of the ordinances which is of most importance for our consideration is that portion of Section 11 of the ordinance of July 15th, 1903, as amended June 28, 1909, and which provides that the company shall forfeit all rights acquired under the ordinance of February 20th,

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20, 1899, together with its plant and equipment for telephone purposes. On February 1, 1909, Section 11 was amended by ordinance passed on that date and on June 28, 1909, another amendment to Section 11 was made by ordinance passed on the latter date.

Section 11 of said ordinance of July 15, 1903, as finally amended by said ordinance passed June 28, 1909, and which has continued in force and effect until the present time is in part as follows:

> "Section 11. If said company, its successors and assigns, shall fail to construct or shall cease to operate fifty (50) miles of such tunnels within ten years from the time this ordinance goes into effect, then and in that case said company, its successors and assigns, shall also forfeit to the city all rights acquired under this ordinance, together with its plant and equipment, for transportation purposes then installed; and if said company, its successors and assigns, shall fail to construct, equip and install a telephone system under the terms of said ordinance to said company of February 20, 1899, adequate for the services of 20,000 subscribers prior to June 1, 1911, or if at any time after said June 1, 1911, said company, its successors and assigns shall not have in operation or shall cease to operate a telephone system serving 20,000 bona fide subscribers, then and in each such case said company, its successors and assigns, shall also forfeit to the city, or to any licensee or grantee of the city (designated or authorized by the city for this purpose), all rights acquired under said ordinance of February 20, 1899, together with its plant and equipment for telephone purposes, and shall forthwith turn over the ownership and possession of said plant and equipment to the city, or to any licensee or grantee of the city (designated or authorized by the city for this purpose), and shall be under obligations to furnish the city, or to any licensee or grantee of the city (designated or authorized by the city for this purpose) without charge, all space in any or all of its tunnels and conduits necessary for the carrying on of said telephone business; such space at no time to be less than that required to reasonably accommodate equipment for the service of 20,000 telephone subscribers; provided, however, that nothing herein contained shall impair the obligation of said company under said ordinance of February 20, 1899, to construct and have in operation within five (5) years from the date of said ordinance of February 20, 1899, a telephone exchange serving two thousand (2,000) telephones, or shall vary the provisions of forfeiture therein contained except as herein expressly provided. * * * This ordinance, so far as it conflicts with or varies from the provisions of the said ordinance of February 20, 1899, or of said ordinance of July 15, 1903, or of said ordinance of July 20, 1903, or of said ordinance of February 1, 1909, shall be taken and construed as and is hereby declared to be amendatory of said ordinances, respectively."

1899 (the ordinance granting the right to establish a telephone system), together with the plant and equipment for telephone purposes:

> (a) "if said company, its successors and assigns shall fail to construct, equip and install a telephone system under the terms of said ordinance to said company of February 20th, 1899, adequate for the service of 20,000 subscribers prior to June 1st, 1911,"

or

> (b) "if at any time after said June 1st, 1911, said company, its successors and assigns shall not have in operation or shall cease to operate a telephone system serving 20,000 *bona fide* subscribers * * *"

THE NATURAL MEANING OF THE WORDS EMPLOYED.

After thus accurately stating the issue presented the former Corporation Counsel proceeds to discuss the proper interpretation of the language employed and states:

> "If this clause be interpreted in accordance with what we consider to be *the most natural meaning of the words employed,* the context also being considered, it would in our opinion mean that the grantee company, its successors and assigns, shall forfeit to the city all rights acquired under said ordinance of February 20th, 1899 (the telephone system grant), together with its plant and equipment for telephone purposes, if at any time after June 1st, 1911, said company did not have in operation a telephone system serving 20,000 *bona fide* subscribers whose subscription contracts were in force and who had instruments and wires in their residences or places of business at all times ready for their use."

"The Law Does Not Favor and Equity Abhors a Forfeiture."

The former Corporation Counsel comes to the conclusion, however, that, in spite of the fact that according to his view this is the more reasonable interpretation of the language of the ordinance, such interpretation would not be adopted by the courts if the matter were presented to the courts, because of the well known doctrine "that the law does not favor, and equity abhors a forfeiture."[4]

Counsel for the bondholders in an opinion dated June 2nd, 1914, submitted to me adopts a similar line of reasoning. In this opinion counsel states after referring to the forfeiture clauses above quoted:

> "I think that in all candor *it must be admitted* that if this language were contained in a clause expressing a condition precedent or if it were in an ordinary contract which did not contain provisions for the forfeiture of rights and confiscation of property, the adjective phrase 'serving 20,000 *bona fide* subscribers' would be interpreted to define the substantive term which it qualifies 'a telephone system,' as one which had 20,000 *bona fide* subscribers whose subscription contracts were in force and which had instruments and wires in the residences or places of business of such subscribers at all times ready for their use. * * *"

But the counsel for the bondholders as does the former Corporation Counsel, holds that the doctrine that "the law does not favor and equity abhors a forfeiture" *prohibits the adoption of this interpretation of the language which counsel for the bondholders, also, admits is the more natural interpretation.*

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[4] *Jacobs* v. *Spaulding*, 71 Wisconsin, 177, 190, cited by the Corporation Counsel in support of the above doctrine, was a case involving the construction of a *private contract* for conveyance of real estate.

The quotation of the Corporation Counsel from 17 Am. & Eng. Enc. of Law, 2nd Edition, page 18, is taken from an article on interpretation and construction, which, as is said at the beginning of said article under the heading "scope of title," treats particularly of instruments *inter partes, such as deeds and contracts.*

Counsel for the bondholders further states in his opinion:

> "To avoid this very consequence (that is a forfeiture) the courts have established the rule that if the words of a forfeiture clause or penal ordinance are susceptible of two meanings that meaning must be chosen which avoids the forfeitures or penalty.[5]

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[5]In support of the above proposition Mr. Shaw in his brief cites a large number of authorities. It is believed, however, that these cases are distinguishable from the present situation and that the rule applied therein is not properly applicable to this situation. The cases of

Voris v. *Renshaw*, 49 Ill., 425, 431-5.
Crane v. *Hyde Park*, 135 Mass., 147,
Gage v. *School District*, 64 New Hampshire, 232, 234,
French v. *Inhabitants of Quincy*, 3 Allen, 9, 13,
Carter v. *Branson*, 79 Ind., 14,
Bailey v. *Wells*, 47 N. W., 988, 989 (Iowa),
Rose v. *Hawley*, 118 New York, 502, 518,
Jackson v. *Silver Nail*, 15 Johnson, 278,
Waldron v. *Toledo A. A. & G. T. Railway Co.*, 55 Mich., 420,

all involve the construction of *a deed or lease of real estate*, which provided for a reversion on the happening of some condition subsequent. These cases were all matters of *private contract* and none of them involved the construction of a grant of privileges or rights by the public to a private corporation.

The cases of

Chicago & Alton Railroad Company v. *People*, 67 Ill., 11, 26 to 27,
City of Chicago v. *Rumpff*, 45 Ill., 90,
Diversey v. *Smith*, 103 Ill., 378, 390,
A. T. & S. F. Railway Company v. *People*, 227 Ill., 270, 278,
Manhattan Trust Company v. *Davis*, 23 Montana, 273, 279.
Philadelphia v. *Costello*, 17 Pennsylvania Superior, 339, 340,
Truman v. *Casks of Gunpowder*, Thacher's Criminal Cases (Mass.), 14,

all involve the construction of statutes or ordinances which provide penalties for the doing of acts declared to be unlawful. In all of these cases the forfeiture was of a punitive nature for the doing of an unlawful act. *The forfeiture provision in the ordinance under consideration is not a punitive provision for the doing of an unlawful act, but is a provision to enforce performance of the company's contractual obligation.* The attorneys for the Company at page 13 of their brief on the "Consequences of a Declaration of Forfeiture," state that the real purpose of the clause here under discussion was the "recalling of a grant the conditions of which had not been fulfilled."

The rule of construction against forfeiture applies to criminal statutes and to statutes and ordinances providing penalties for violations of law but these cases are not analogous to the present situation.

Two other cases cited by Mr. Shaw are *Mill Creek Township* v. *E. R. T. T. Railroad Company*, 216 Pennsylvania State, and *State* v. *Boyce*, 43 Ohio State, 46. The former Mr. Shaw did not cite as directly bearing on the rule of construction and nothing was said in the opinion of the court about this rule. In the latter case the court referred to the rule that equity abhors a forfeiture and applied it to the question there involved of whether the delay in commencing work within the time required, was excused by reason of injunction proceeding instituted by the city solicitor. Here then the court was really construing the conduct of the city and not the words of the franchise or ordinance.

> *Of course I do not mean that a forfeiture will be avoided by unreasonably straining the meaning of the words employed.* The words must be susceptible of that construction *without violence,* and yet it will be seen by an examination of the authorities that where the line is to be drawn depends upon the particular cases. Where the injustice is manifest the courts seem to stop at nothing in the application of this rule of construction."

Counsel for the Company also rely upon this doctrine.[6]

The Issue Stated.

I have referred at considerable length to the opinions of the Corporation Counsel, the counsel for the bondholders and the counsel for the Company in order to define as accurately as possible the issues that are presented in this connection and to eliminate the discussion of unnecessary questions.

It is admitted by all that the power of forfeiture exists provided the language of the forfeiture clause is plain and unambiguous. The test laid down by counsel for the bondholders when he says that:

> "Of course I do not mean that a forfeiture will be avoided by *unreasonably straining* the meaning of the words employed." "The words must be susceptible of that construction (that is the construction avoiding the forfeiture) *without violence"* to the meaning of the words,

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[6] In the opinion of Messrs. Schuyler, Ettelson & Weinfeld, the following cases were cited in support of the doctrine that forfeitures are not favored:

Voris v. *Renshaw*, 49 Ill., 425, 432.
Palmer v. *Ford*, 70 Ill., 369, 377.
Monson v. *Bragdon*, 159 Ill., 61, 65.
St. Louis, Jacksonville & Chicago Railrood Co. v. *Mathers*, 71 Ill., 592, 597.

These cases all involve the construction of deeds or leases to real estate between private parties and did not involve the construction of a grant by the public to a private corporation. *The rule contended for by counsel in that opinion is undoubtedly applicable to cases of private grant and private contract but we believe the same rule is not applicable with anything like the same strictness to public grants or contracts in which the public gives privileges and rights in public property to private corporations.*

is in my view a correct statement of the principles with which we have to deal. If the forfeiture clause has two interpretations equally reasonable, the one authorizing a forfeiture and the other interpretation not authorizing a forfeiture, undoubtedly that interpretation which avoids the forfeiture would be the one adopted by the court. But if, on the other hand, as counsel states, the interpretation avoiding the forfeiture involves "unreasonably straining of the words employed" and cannot be arrived at "without violence" to the ordinary meaning of the words, then the doctrine that the law does not favor and equity abhors a forfeiture would not go so far as to require the adoption of such strained and violent interpretation of the words employed.

The Principles of Construction to Be Borne in Mind.

In any attempt to arrive at the correct interpretation of the forfeiture clauses, there are two principles of law in addition to that above cited and relied upon to such a marked extent by counsel who have heretofore dealt with this question which ought to be considered, and those are the well recognized principles:

First Principle.

That the law will construe the grant of a franchise or license by a municipality in favor of the municipality and against the grantee. This principle of strict construction of municipal grants has been recognized by the courts of all jurisdictions and in a great variety of cases.[7]

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[7] In *Blocki* v. *People*, 220 Ill., 444, an ordinance had granted to a street railway company the authority to construct tracks on certain of the streets in the City of Chicago with the condition that within two years after the date of said ordinance a single track line should be put in operation and within five years a double track line should be completed. For failure to perform this condition the privileges under the

Of the cases bearing on this principle cited below, I would call attention particularly to the leading authority in this state of *Blocki* v. *People*, 220 Ill., 444, a case in-

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ordinance were to cease and terminate unless such delay was excused. The railway company had laid its tracks on some of the streets but had failed to complete its construction on certain other streets within the five year period. It applied to the Commissioner of Public Works for a permit to allow the construction on certain streets included within the grant and said permit was refused on the ground that the time within which the privileges were to be exercised had elapsed. The railway company sought to mandamus the Commissioner of Public Works to issue such permit and set up as an excuse for the failure to complete the construction within the time specified the fact that an injunction had been issued against the construction of the tracks on one of the streets contained in the grant. It was the contention of the railway company that the ordinance was to be construed as granting the right to construct a single system and that anything which caused delay in the construction of any part thereof would excuse the construction on any other of the streets covered by said ordinance. The ordinance was open to this interpretation or to the interpretation that tracks should be laid on all of the streets as fast as possible and delay in the construction would be excused only on those particular streets which were affected by the injunction against laying tracks. The first interpretation would prevent a forfeiture; the second interpretation would result in the loss to the railway company of its privileges under the ordinance. The Supreme Court held that the latter interpretation was the proper construction of the ordinance in question and in so holding referred to the rule that ordinances granting rights in certain states are to be construed most strictly against the grantee and in favor of the public. Quotations from the opinion of the court in this case are set out above.

The case of *City of Chester* v. *Wabash, Chester and Western Railroad Company*, 182 Ill., 382, adopted the same rule when it held in favor of the city in an action of ejectment to recover possession of the city streets after the expiration of an ordinance granting to the defendant the right to lay tracks on those streets for a period of twenty years. The court said:

> "The right granted by a city council to a railroad company to lay its tracks in a street and operate its cars thereon is not a franchise but a *property right merely contractual, and subject to the same conditions, restrictions and limitations as any other property owned by other persons. And such contract rights, so far as they affect the public, are to be strictly construed in favor of the public.*" p. 389.

In *Chicago* v. *Oak Park Elevated Company*, 261 Ill., 478, 492, the court said:

> "Ordinances granting the right to construct and operate a street railway system are to be construed *most strictly against the grantee.*"

In *Turnpike Co.* v. *People of Illinois*, 96 U. S., 63, the court said:

> "Grants of franchises and special privileges are always to be construed *most strongly against the donee and in favor of the public.*"

In *Coosaw Mining Co.* v. *State of South Carolina*, 144 U. S., 550, the court had before it the construction of a mining grant on which the question was raised as to whether it gave a perpetual or limited grant. It was held that the latter was the proper construction on the rule that such grants should be construed strictly against the grantee. At page 562 the court said:

> "If the Act of 1876 is fairly susceptible of either of the construc-

volving the interpretation of an ordinance granted by the City of Chicago to a street railway company for the laying of its tracks in a number of streets. There were

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tions we have indicated, as we think it is, the interpretation must be adopted which is most favorable to the state. The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the government or the public has an interest. *Rice* v. *Minnesota & N. W. R. Co.*, 66 U. S., 1 Black, 358, 380 (17, 147, 153); *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S., 666 (24: 1038); *Hannibal & St. J. R. Co.* v. *Missouri River Packet Co.*, 125 U. S., 271 (31: 735); *Central Transp. Co.* v. *Pullman Palace Car Co.*, 139 U. S., 24, 49 (35: 55, 64); *Stein* v. *Bienville Water Supply Co.*, 141 U. S., 67, 80 (35: 622, 627); *State* v. *Pacific Guano Co.*, 22 S. C., 50, 83, 86. * * * *This principle, it has been said, 'is a wise one, as it serves to defeat any purpose concealed by the skilful use of terms to accomplish something not apparent on the face of the Act, and thus sanctions only open dealing with legislative bodies.' Slidell* v. *Grandjean*, 111 U. S., 412, 438 (28: 321, 330)."

The case of *People* v. *Broadway Railroad Company of Brooklyn*, 126 New York, 29, involved an action to have the franchise of the defendant forfeited for non-user. The railroad company was given the right to lay its tracks upon various streets and it was required that the tracks be laid as soon as the streets were opened and graded. Upon failure to comply with the condition of the act it was provided that all rights and privileges thereunder should be forfeited. This act was open to two possible interpretations: the one, insisted upon by the railroad company, that it did not require the company to build any part of the system until all of the streets were opened and graded; the other, insisted upon by the city, that it required the railroad company to lay its tracks upon such streets as were opened and graded and to extend the system as soon as other streets were opened and graded. In the lower court the interpretation urged by the railroad company was adopted (see 56 Hun., 45) but on appeal it was held that the latter construction of the act was the proper one and the franchise of the defendant railroad company was declared forfeited for failure to construct its tracks as provided by the act. In rendering this decision the court states at length the rule of strict construction against the grantee when the public has granted privileges or franchises to private corporations.

The court says at page 36:

"The act of 1860 was obtained by the defendant or in its interest. It may be assumed that the language therein contained was the language chosen by it to define the rights and franchise which it sought by the act. As the act conveyed to it franchises and special privileges its language must be construed most favorably to the people and all reasonable doubts in construction must be solved against the defendant. *Words and phrases which are ambiguous or admit of different meanings are to receive in such cases that construction which is most favorable to the public.* * * * The act must now be construed as the courts would have construed it if it would have come in question soon after its passage. *The defendant cannot claim a liberal or enlarged construction of the act to shield itself against a forfeiture alleged to have been voluntarily incurred.* It would be quite a paradox to hold that it could enlarge its franchise or extend its rights by exposing them to condemnation for non-user. The language of the act must under all circumstances and in all proceedings and actions receive the same construction and have the same scope and meaning. But while the act is to be strictly construed in such a case the conduct under the act which is claimed to constitute the

was more favorable to the grantee, and upon such interpretation depended the question of the forfeiture of the privileges granted.

The Supreme Court held that the interpretation of the ordinance authorizing the forfeiture was the one that should be adopted and in support of their conclusion cited the principle of strict construction to which I have referred. The court said:

> *"We agree with counsel for appellant that the grants by the public such as are given by the City of Chicago in its ordinance are to be construed most strongly against the grantee."*

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forfeiture of the corporate rights and franchises is to have a charitable and liberal construction like any conduct tending to penal consequences. In considering such conduct courts will lean against forfeitures and *the doctrine that courts are reluctant to enforce forfeitures can have no other application than this.*"

If there were any doubt or ambiguity as to whether the Chicago Tunnel Company had 20,000 bona fide subscribers, its "conduct"—to use the phrase in this case—would receive a "charitable and liberal construction," but there is no doubt as to the "conduct" of the Company. It is frankly admitted by its own counsel that it has not this number of bona fide subscribers.

It was held by the court in the above case that the proper construction of the act required the railroad company to lay its tracks upon streets as soon as any part of the street was opened and graded. The court further said:

> "But even if it were absolutely certain that the defendant could have made no profit by building the roads to the extent which we have indicated, yet that is no answer to the proposition that it is the duty of the defendant to build them."

This case involves the construction of a forfeiture clause contained in an act granting to a private corporation rights and privileges in the city streets and seems closely analogous to the present situation.

In *Cumberland Gas Light Co.* v. *W. Va. & Maryland Gas Co.*, 188 Fed., 585, at page 589 the court cites the leading case on this proposition of *Charles River Bridge Co.* v. *Warren Bridge Co.*, 11 Pet., 420, viz., that legislative acts granting franchises to private corporations are to be construed strictly according to their terms. The court then says:

> "In Rose's notes on this case (Vol. 3, p. 681), it is said touching this rule 'it may be questioned whether the Supreme Court has ever laid down *a more salutary doctrine* than the principle here announced and the cases which follow show how firmly it has become embedded in our jurisprudence.'
>
> *And more than 100 cases from substantially all the courts of this country in support of this statement are cited.*"

See also:

Cleveland v. *Norton*, 60 Mass., 380.
State v. *St. Paul M. & M. Railway Co.*, 98 Minn., 380.
Rogers Park Water Co. v. *City of Chicago*, 131 Ill. App., 35.
Ex Parte Russell, 163 California, 668.

two possible constructions of this ordinance, one of which was the more favorable to the city and one of which

And again in the same opinion:

> "And as we before stated, *a grant similar to the one at bar is to be most strongly construed against the grantee and in favor of the public.*"

The facts involved in this case are set out below in the note, containing this and other citations.

Among the different opinions that have been rendered in this matter and which have been submitted to us for examination, only one, that of Messrs. Fairleigh & Fairleigh, mentions this rule of construction here referred to and it is contended by them that this rule simply applies when the question under consideration is the extent of the grant. It is true that some of the cases do deal with the extent of the grant in laying down this principle of strictness of construction against the grantee; but, the leading case in this state that of *Blocki* v. *People,* as I have already stated, was a case of forfeiture and on the authority of this case and of other forfeiture cases cited in the note I have come to the opinion that this rule of strict construction should be applied to forfeiture as well as other cases.

Second Principle.

The other principle which should be borne in mind in seeking to arrive at a correct construction of the language used in the forfeiture clauses above referred to is that recognized by a few well considered cases holding that the rule above stated requiring a construction of an ordinance against the interpretation authorizing a forfeiture will not be followed when the provisions authorizing the forfeiture were inserted for the

public benefit and for the purpose of securing the performance of a service in which the public is interested.[8]

In *Farnsworth* v. *Minnesota & Pacific R. R. Co.*, 92 U. S., 49, 23 Lawyer's Ed., 530, Mr. Justice Field in delivering the opinion of the Supreme Court of the United States said:

> "But it is said that provisions for forfeiture are regarded with disfavor and construed with strictness and that courts of equity will lean against their enforcement. This as a general rule is true when applied to cases of contract and the forfeiture relates to a matter admitting of compensation or restoration. *But there can be no leaning of the court against a forfeiture which is intended to secure the construction of a work in which the public is interested where compensation cannot be made for the default of the party,* nor where the forfeiture is imposed by positive law."

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[8] In *Farnsworth* v. *Minnesota & Pacific Railroad Co.*, 92 U. S., 49, 23 Lawyers' Edition, 530, the State of Minnesota had granted to the defendant railroad aid in the construction of its road by state bond issues. The act provided that the railroad company complete the construction of certain parts of the road within certain specified times and in default thereof that all the property and the franchise of the said railroad company should be forfeited to the state. The railroad company failed to complete the construction as required by the act and thereafter the legislature passed an act creating a new company and granting to it all the rights, property, franchise and interest of the Minnesota & Pacific R. R. Co. This case involved the construction and validity of the last mentioned enactment and the court held that the legislature might declare a forfeiture upon non-compliance with the conditions of the grant. It was strongly urged by the railroad company that the rule of strict construction against forfeiture should be applied and the act so construed as to prevent the forfeiture. The court, however, held that in the construction of a forfeiture clause inserted to secure the building of a work in which the public was interested *there could be no application of the rule of construction against forfeiture.* The forfeiture was upheld on considerations of public policy.

The doctrine laid down by the above case is also followed in the case of *City of Tower* v. *Tower & Soudan Railway Company*, 68 Minn., 500, where the court had before it the construction of a clause in the city ordinance providing for forfeiture of road and franchise of a street railway company if said company ceased operation for a period of one year or more. The court in discussing the question of interpretation of the ordinance and in declining to adopt a construction against forfeiture uses the language quoted from *Farnsworth* v. *Minnesota, supra.*

See also:

Sparks v. *Liverpool Water Works Co.*, 13 Ves. Jr., 428.
Atlantic & Pacific Railroad Company v. *Mingus*, 165 U. S., 413.
U. S. v. *Oregon & C. Railroad Co.*, 186 Fed., 861.

That the forfeiture clause in the ordinances now under consideration was inserted for the purpose of securing the construction by the Chicago Tunnel Company or its predecessor of a public work, to-wit, the Automatic Telephone System, and the maintenance of competitive telephone service, is self-evident and the public interest was directly involved in securing the carrying out of these purposes by the grantee. The attorneys for the Company admit that the clause was inserted for the purpose of "recalling a grant the conditions of which had not been fulfilled." See note 5.

THE CORRECT CONSTRUCTION OF CLAUSES (A) AND (B).

Bearing in mind the above principles relating to the proper construction of such a franchise or license as is here involved, and coming to a consideration of the exact language employed in the forfeiture clauses, it is most significant that the forfeiture provision contains two separate clauses; the clauses (a) and (b) set forth in the Corporation Counsel's opinion and quoted above. Clause (a) has to do with the *adequacy* of the telephone system to be constructed by the grantee prior to June 1st, 1911. The grantee was required to construct, equip and install a telephone system *adequate* for the service of 20,000 subscribers prior to June 1st, 1911. It is contended by those who are opposed to a forfeiture being declared in this matter that clause (b) also refers merely to the *adequacy* of the plant and that it simply requires that the grantee at all times after June 1st, shall continue to have in operation a telephone system *sufficient and effective* for the service of 20,000 subscribers. Such an interpretation of clause (b) minimizes the effect of such clause and ignores as it seems to me the distinction that was evidently intended by those who

drafted this ordinance between clause (a) and clause (b).[9]

Clause (a) as already stated relates to adequacy of plant. Clause (b) relates to the actual operation of a plant and the number of bona fide telephone subscribers which such plant serves. It is contended that the word "serving" as used in clause (b) means "adequate or sufficient to serve" and it is stated that definitions of that general character can be found in dictionaries of recognized authority. But it is not denied that the word "serving" of course has another and more usual meaning and the context in which it is used makes it clear to me that when the words "a telephone system serving 20,000 *bona fide* subscribers" was used it was intended to require that there should be 20,000 *bona fide* subscribers enjoying and using at the time the service of this telephone system. Telephone service is a phrase too well known to need any definition or explanation from me. Every one knows what it means.

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[9]In *Rothschild* v. *New York Life Insurance Co.*, 97 Ill. App., 547, the court had before it for construction a section in the insurance statute which provided in substance that life insurance companies "*may* make distribution of such surplus" and in the next sentence said that in determining the amount of the surplus "there *shall* be reserved an amount not less than," etc. It was contended that the word "*may*" as used in the first sentence quoted should be construed as indicating an imperative duty, that is to say, as meaning the same thing as though the word "*shall*" had been used there. In its opinion the court called attention to cases in which the word "may" had been construed in the sense of "shall," *but it refused to apply to the word "may" the imperative meaning when that word was used in the same section as the word "shall" and the two referred to different situations.* The court said at page 555:

> "Applying these rules to the words 'may' and 'shall' in Section 14, the former must be regarded as permissive and the latter as imperative. We can conceive of no good reason, nor are we aware of any rule of interpretation which would warrant the holding that the words 'may' and 'shall' are used in the same sense in the section, and that imperative."

The situation in the above case is somewhat analogous to the use of the phrase "adequate for the services of 20,000 subscribers," and the phrase "serving 20,000 *bona fide* subscribers" as used in the Chicago Tunnel ordinance. *These two phrases are used in the same section and refer to conditions arising at different times.* Therefore, it is clear that the two phrases using different language did not mean the same thing and that the phrase "serving 20,000 *bona fide* subscribers" does not mean a telephone system merely adequate for the service of 20,000 subscribers.

The construction contended for that all that this clause meant was that the telephone system should be *adequate or sufficient to serve* 20,000 subscribers entirely ignores as it seems to me the important and significant words *"bona fide,"* which qualify subscribers and indicate that there should be *actual* telephone subscribers having contractual relations with the telephone company entitling them to the service of this telephone system. It is most significant that these words, *"bona fide"* do not appear in clause (a) which deals with adequacy or size of the plant and merely requires that the plant should be adequate to serve "20,000 subscribers" if obtained. Naturally the qualifying words *"bona fide"* were not here used in clause (a). When defining *adequacy* there is of course no need or propriety in qualifying the word "subscribers" by the adjective "bona fide." The plant should be *adequate* to serve 20,000 *possible* subscribers. The use of "bona fide" in clause (b) distinguishes it from clause (a) and shows that clause (b) does not refer to mere *adequacy* of plant.

The entire clause (b) as distinguished from clause (a) relates to the *actual operation* of the telephone system and not to the mere construction of an adequate plant. Clause (a) says that if the company:

> "shall not have *in operation* or shall cease to *operate* a telephone system *serving* 20,000 *bona fide* subscribers, it shall forfeit its rights under the ordinance of February 20th, 1899, together with its plant and equipment for telephone purposes."

To give this clause the construction contended for by counsel would as it seems to me be doing the very thing which counsel for the bondholders admits is not permissible. It would be *"unreasonably straining the meaning of the words employed"* and would do *"violence"* to the language of the ordinance.

The Contention That All the 20,000 Subscribers Would Have to Be Secured in One Day.

It remains for me to discuss a number of special considerations urged by counsel for the company or for the bondholders in support of the interpretation of these forfeiture clauses for which they contend. Among these I find that it is contended that if the ordinance is construed in the manner which this opinion suggests and which it has been stated by both the Corporation Counsel and one of the counsel for the bondholders is the *more natural interpretation,* this construction would require that all these 20,000 subscribers must have been secured on June 1st, 1911. Counsel urge that none of them could have been secured before the night of May 31, 1911, and that at all times after June 1st, 1911, there must have been a full number so that it appears, as counsel contends, that they must have all been secured during that *one day.* We search in vain for any basis in any of the ordinances for this argument. There was nothing in the ordinances to suggest that the Illinois Telephone and Telegraph Company, the original grantee, was to postpone securing its subscribers until the last possible moment but on the other hand there is every indication in the ordinances that the Company was expected and required to use at all times all possible diligence to build up its number of *bona fide* subscribers during the period of years intervening between the passage of the 1903 amendatory ordinance which gave the company notice that within a period of five years from the date of the ordinance and expiring July 15, 1908, the Company must have 20,000 *bona fide* subscribers. The period allowed for securing these subscribers was subsequently extended by the amendatory ordinance passed February 1st, 1909, to Oc-

tober 8, 1909, and then finally fixed by the further amendatory ordinance of June 28, 1909, at the date already referred to of June 1st, 1911. I am not advised as to how many actual subscribers the telephone system had on any one of the dates of the passage of these several ordinances, but an examination of these ordinances shows that the Company from the date of the passage of the 1903 ordinance should have known that it must within a certain limited period secure 20,000 *bona fide* subscribers and it is, to my mind, a strange contention that there was anything in the ordinance to justify the company's waiting until the night of May 31, 1911, before seeking to secure any subscribers and then being required in *one day's* time, the day of June 1st, 1911, to secure the total number of 20,000 subscribers.

THE GREAT SIGNIFICANCE ATTACHED TO THE WORD "ALSO."

Another suggestion earnestly advanced by counsel is that the word "also" contained in the forfeiture clause is of very great significance. It is urged that because under the ordinance as it now stands it is provided "that in each such case (that is, in case of a violation of either clause (a) or clause (b) already referred to) said Company, its successors and assigns shall *also* forfeit to the city * * * all rights acquired under said ordinance of February 20, 1899, together with its plant and equipment for telephone purposes," and it is urged that this word "also" must be construed as meaning that such a forfeiture of the *telephone* rights could take place only on condition that a forfeiture of the *transportation* rights of the Tunnel Company had previously or at least contemporaneously taken place. This contention is based on the fact that just previous to the clauses authorizing the

forfeiture of the *telephone* rights the ordinance provided for the forfeiture of the rights acquired under the ordinance of 1903 for the construction of a *transportation* system together with the plant and equipment for transportation purposes. On examination it appears that this clause allowing this forfeiture of the *transportation* rights contains in like manner the word *"also"* so that if the construction contended for by counsel is correct the city could not proceed under *this* clause for the forfeiture of the transportation rights and franchise unless it had first or did contemporaneously therewith provide for a forfeiture of the transportation rights under the terms of the ordinance set out in the paragraph prior to the one just referred to and so quite removed from the clauses (a) and (b) above quoted for the forfeiture of the *telephone* rights. Referring back to this earlier clause we find that it provides first for a forfeiture to the city of the sum of $200,000 to be paid within sixty (60) days after the expiration of the period provided for the construction of the transportation system and only in case of the failure of the company to pay the cash penalty was the company to forfeit the rights acquired under the 1903 franchise to operate a transportation system.

With all due deference to counsel it seems to me that such a construction so vitally and fundamentally changing the entire meaning of all of these forfeiture clauses cannot be based upon the word "also," a word, which, according to the admissions of counsel, can be used in a great variety of meanings. One of the well recognized meanings of the word "also" is "likewise" or "in like manner" or "further," and these meanings of the word would simply indicate that in this clause the City Council was providing other and additional remedies by way of forfei-

ture and not that the remedy here provided was one which could be availed of only upon the condition precedent that all of the earlier forfeitures had already been exercised.[10]

That the interpretation of the ordinance contended for by counsel is not the correct one is, to my mind, shown conclusively by the fact that it is provided in the ordinance, that, if the city forfeits the telephone rights and property under either of the forfeiture clauses (a) or (b) already referred to, the company "shall be under obligations to furnish the city * * * without charge all space in any or all of its tunnels and conduits necessary for the carrying on of said telephone business; such space at no time to be less than that required to reasonably accommodate equipment for the service of 20,000 telephone subscribers." The ordinance clearly contemplated that the *telephone* rights and property might be forfeited by the city in spite of the fact that the company continued to own and operate the tunnels for *transportation* purposes and that in that event the company must give the city space in its tunnels for the telephone equipment which had already been forfeited to the city.

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[10]In the opinion of Schuyler, Ettelson & Weinfeld the following cases are cited as supporting the construction placed upon the word "also" as used in the clause relating to the conditions of the forfeiture of the telephone system:

Panton v. *Tefft*, 22 Ill., 367, 376.
Morrison v. *Schoor*, 197 Ill., 554, 566.
Loring v. *Hayes*, 86 Me., 351, 355, 357.
Kinkle v. *Wilson*, 29 N. Y. Supp., 27, 31.
Stockton v. *Maddock*, 10 Fed., 132, 134.
Rawlings v. *Hunt*, 90 N. C., 270, 276.
Van Dusen v. *Fridley*, 43 N. W. Rep., 703, 5.
Mace v. *Mace*, 85 Me., 283, 286.

The above cases give to the word "also" various definitions of "in addition to," "in like manner," "likewise," "besides," and "too." None of these cases goes so far as to indicate that the provision of the first of two clauses connected by the word "also" must be fulfilled before the provisions of the second clause can apply. None of the cases indicate that the first clause is a condition precedent to the second clause. *While the cases indicate that the word "also" signifies conjunction or cumulation, they do not support the extreme proposition made in the opinion referred to that the word indicates the necessity of the happening of the first condition before the second condition can have any validity whatever.*

This shows that it was not necessary, as contended by counsel, that the city should first forfeit the tunnels and the transportation equipment before taking any action for the forfeiture of the telephone rights and equipment, and that as a matter of fact the opposite procedure was authorized by the ordinances.

Referring to this contention counsel says:

> "*The argument of this criticism is a logical one,* but subsequent study has convinced us that the premise upon which it is based is not valid, and that, consequently, the argument itself, depending for its conclusion upon the validity of that premise, falls when the falsity of the premise appears."

I will not attempt in this opinion to review in detail counsel's argument in this connection. I have given it consideration and it does not seem to me to justify the conclusion arrived at. Counsel relies in part upon Section 4 of the ordinance of 1903 providing that the company "may lease but not beyond the term of this grant * * * space in its said tunnels * * * only to such persons or corporations as may hereafter be authorized by the city to conduct or carry on business in or through conduits or tunnels authorized * * * and a certified copy of such lease shall be filed with the City Comptroller." It is urged that under the terms of this Section 4 it would have been competent for the company to make leases co-extensive in time with the franchises of the company and that the city could not, by any forfeiture that it attempted, affect the leases thus made and unexpired. I cannot take the same view of this matter that counsel does.

The ordinances are matters of public record and anyone dealing with the tunnel company or taking a lease therefrom would certainly be chargeable with full notice of all the provisions of the ordinances and any rights that such licensee might acquire would be subject to the terms

of the ordinances permitting forfeiture by the city of the telephone rights and property on certain conditions and of the transportation rights and property on certain other conditions. Counsel in this same connection says:

> "A re-examination of the ordinances since writing this opinion, has convinced us that the draftsman of the ordinances intended to divide the tunnel properties in the streets into three parts, instead of two, namely:
>
> 1. The tunnels themselves.
> 2. The transportation system (including the right of way in the tunnels and the tracks, etc.).
> 3. The telephone plant and equipment.

I have not been able to agree with counsel in this regard, but my views in this connection are stated below in my discussion of the second of the two questions propounded by your Committee.

Alleged Inability of Company to Perform Conditions of Ordinance.

Another contention made by counsel in support of the construction of these forfeiture clauses for which counsel stand is that if it be held that the company was required at its peril to secure 20,000 bona fide subscribers to the telephone system, such requirement would be void because it is something beyond the control of the company and is impossible of performance. That is to say, it is contended that inasmuch as the company has no power to compel the people of Chicago to become subscribers to its automatic telephone system the company cannot be forced by the city to live up to the provisions of the ordinance requiring the securing of such number of bona fide subscribers.

It can be said in reply to this suggestion that the company sought and secured from the City of Chicago a franchise containing this provision. The company voluntarily entered into a *contract* with the city containing

this as one of its provisions. The company then knew as well as it does at present that it could not compel the people of Chicago to take the automatic telephone system. I do not mean by this that they knew that the people of Chicago would not voluntarily become subscribers to that system, but they knew that the company possessed no means of compelling the making of subscription contracts. In spite of this the company by its solemn act in seeking and accepting this ordinance assumed the burden of performing this condition and cannot now be heard to complain of the difficulty or even impossibility of its performance. Many a contract is enforced against the parties thereto involving situations not unlike that here presented. Suppose a sales agent of a great manufacturing or mercantile concern guaranties absolutely as a condition of securing, say an exclusive agency, that be will sell in each of several years a minimum of a named amount of goods. He has no power to force the public within the territory given to him exclusively to buy the goods which he sells. Still if he fails to perform this condition of his employment I take it there can be no doubt that he would have to surrender his exclusive agency and admit that his employer could deprive him of the privileges which had been secured to him under his contract for a long period of years on condition that he should in each and every year sell the amount of goods therein named.[11]

[11]The case of *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy*, Law Reports, Indian Appeals, 1875-76, was cited by counsel for the bondholders as an authority to the effect that where the defendant had hired plaintiff for the term of plaintiff's life and agreed to give the plaintiff a commission on all the business of the defendant, there would be an implied condition that if the defendant found itself in financial difficulties and was wound up, the plaintiff could not recover for commissions not then earned. This case seems to me distinguishable from the facts stated above. In this case from the Indian Appeals there was no express stipulation and the court implied this condition in the absence of an express stipulation. If there had been an express stipulation that the commissions should continue without regard to the defendant's financial condition or situation, the decision would, I take it, have been different; and in the ordinances now under discussion we have an express undertaking as I view it on the part of the company to have at all times 20,000 bona fide subscribers.

In the same way here, this company chose to accept a license from the city which, under the authorities, constituted a contract between the company and the city and the mere fact that such contract contained provisions onerous or difficult of performance cannot excuse the company if it seeks to continue to exercise the rights and privileges which were granted to it on these express conditions with which the company has failed to comply.

Effect of Chicago Telephone Company Ordinance of 1907.

Another similar consideration is suggested to the effect that the city has prevented the company from performing this condition by reason of certain ordinances which the city granted to the Chicago Telephone Company in 1907, regulating the rates of said company and that by so doing the city made that company a still more successful competitor of the automatic telephone system and thus, as it is contended, prevented the automatic company from securing the minimum number of bona fide telephone subscribers required; or, if they did not prevent their securing such number, at least prevented their retaining such number.

The contention as it seems to me amounts to this, that the City of Chicago having granted certain rights to the Automatic Company deprived itself of all ability to pass a subsequent ordinance granting other rights or making other regulations for the other public utility engaged in the same line of business, the Chicago Telephone Company. Certainly this contention cannot be sustained. There is no need of the citation of authorities to the effect that a city council does not in this way deprive itself of its powers or relieve itself from the duty to regulate other public utilities operating within the municipality by the passage of ordinances of later date.

THE CONTENTION THAT THE CLAUSES AMOUNT TO A "BET."

Another suggestion is made that the forfeiture clauses in the ordinances now under consideration if given the construction for which I contend, will make these clauses in effect a bet and so obnoxious to the general policy of the law condemning transactions involving chance or gambling. I fail to find in the ordinance any justification for this contention. The clauses of forfeiture therein contained are, as has been repeatedly stated by counsel for the company and the bondholders, conditions subsequent, similar to conditions often inserted in ordinances in favor of public utility corporations and in some sense similar to conditions subsequent in private deeds and contracts, although as above stated, in some particulars the rules of law as applied to such private contracts differ from those applicable to the construction of these public contracts. But that such a condition subsequent constitutes a *bet* merely because there was always the possibility, which it would seem that all parties must have recognized, that the company would never be able to secure 20,000 *bona fide* subscribers, does not in any way justify to my mind the conclusion that it was a betting transaction. Undoubtedly both parties to this contract, the company and the city, had confidence that the company would be able to make good and secure the necessary 20,000 *bona fide* subscribers. The City of Chicago would never have granted the franchise, would never have permitted its streets to be torn up and the public to be inconvenienced in that and other ways if it had not been confidently expected that the company would be successful in securing the necessary number of bona fide telephone subscribers and would continue to be an active competitor of the Chicago Telephone Company, it being be-

lieved at that time that competition between telephone companies was desirable from the public standpoint.

I have now discussed most of the principal contentions made by counsel for the company and the bondholders in support of the views which they advance in connection with the first of the two questions submitted to me by your Committee. I now pass to a consideration of the second question propounded, which was No. 3 among the questions propounded by his Honor, the Mayor, to Mr. Fisher.

Third Question.

In reply to this question, which is:

> What property the city will get in the event of a forfeiture?

I reply that:

> The city will get the plant and equipment of the company for telephone purposes.

Just exactly what physical property will be covered by the forfeiture it is impossible for me at this time to determine. In fact there may be many difficult questions arising as to just what is telephone equipment or property as distinguished from just what is transportation equipment or property of the Tunnel Company. The ordinances recognize that there may be such difficulty in determining the distinction between the two and in Section 6 of the 1903 ordinance providing for the appraisal of the transportation property which the city was authorized to take over at the end of 20 years, it is provided:

> "The appraisers shall *determine* what tangible property, real and personal in addition to the said tunnels owned by the company and then used for purposes of this grant is reasonably required for its continued operation."

I have not as yet even had time to consider with care just what general classes of property would pass to the city under a forfeiture. That is a question upon which I desire more time for consideration.[12]. But that there can be in a general way a distinction made between the *transportation* property and the *telephone* property seems to be contended by the Tunnel Company itself, for in the ordinance introduced on its behalf and for the purpose of authorizing the sale to the Chicago Telephone Company of the telephone property and equipment it is stated:

> "That permission and authority are hereby granted to the Chicago Tunnel Company to sell its *telephone* plant, system and equipment, including all the property of the Chicago Tunnel Company necessary and suitable to and used by it for carrying on the *telephone* business in the City of Chicago,

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[12]It has been informally suggested that there would perhaps be a different construction of the ordinance so far as it affects the forfeiture of the property from the construction as to its effect upon the forfeiture of the franchise or license to use the city streets.

In *City of Tower* v. *Tower & Soudan Street Railway Company*, 68 Minn., 500, an ordinance granted the use of the streets for a street railway. The grant was upon a condition that the railway be constructed within a certain time and be operated continuously. In default thereof the railway company was to forfeit its rights to use of the streets and was to forfeit its "road" to the city. Upon the failure of the railway company to operate for a considerable period the city declared a forfeiture of the franchise and of the road and the forfeiture was upheld. In upholding the action of the city in forfeiting the franchise and the property the court held that the rule that forfeitures are not favored in the law could not apply to a case involving the public interest. *The same rule was applied to the forfeiture of the property as applied to the forfeiture of the franchise.* Furthermore the court gave a broad and liberal interpretation to the word "road" as used in the forfeiture provision of the ordinance. It was contended by the railway company that the word "road" included only the roadbed and that the railway company was, therefore, entitled to the steel rails. *The court said, however, "the word 'road' as used in Section 12 includes the roadbed with the ties, rails and all that constitutes a complete superstructure on which cars transport passengers or property or both."* p. 504.

The case of *Farnsworth* v. *Minnesota & Pacific R. R. Co.*, 92 U. S., 49, likewise involved the forfeiture of property in addition to the franchise of a railroad company. The court made *no distinction between the property and the franchise* in applying the rule that public policy and the public interest forbade the application of the doctrine that forfeitures are not favored and that equity abhors a forfeiture.

In the case of *Whiting* v. *Village of New Baltimore*, 127 Mich., 66, the city granted to a railway company a license to lay its tracks on certain streets and required that a sum of $2,000 be deposited with the city,

erected, operated and maintained under the provisions of an ordinance adopted by the City Council of the City of Chicago on the 20th day of February, 1899, and accepted by the Illinois Telephone and Telegraph Company, a predecessor of the Chicago Tunnel Company, on the 3rd day of April, 1899, and under the provisions of ordinances amendatory thereof, *separate and apart, however, from its tunnels and tunnel systems and its plant and equipment for transportation and other purposes.*"

Running throughout the ordinances there seems to be a distinction between the *telephone* system on the one hand and the *transportation* system on the other. The first ordinance of 1899, of course, referred exclusively to the telephone system. The amendatory ordinance of 1903 granted the right to conduct a transportation system and the two were expressly separated by clause 6 by which it was provided that

"The City Council shall have the right, at the expiration of twenty (20) years from the passage of

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which sum was to be forfeited in the event of the failure of the railway company to construct its road within a certain period. Upon failure of the railway company to so construct its road as provided by the ordinance the city took possession of the sum of $2,000 and *the rights of the city to forfeit this sum was upheld by the court.*

City of Detroit v. *People's Telephone Company*, 135 Mich., 696, is a similar case where the forfeiture of $5,000 to the city was upheld. The telephone company had failed to commence operation within the time required by the ordinance. In upholding the right of the city to forfeit this sum in accordance with the terms of the ordinance the court said:

"It is true that the law abhors forfeiture but there can be no other construction of this charter than that the defendant was to forfeit the sum as liquidated damages for the failure to fulfill the agreement to construct the plant and operate it as provided in Section 5." p. 699.

The foregoing cases distinctly uphold the right to declare a forfeiture of *property* when the provisions of an ordinance have been violated.

See also *City of Belleville* v. *Citizens' Horse Railway Co.*, 152 Ill., 171, cited in Note 12.

Forfeitures of public land grants have been upheld by the Supreme Court of the United States in numerous cases. In many such cases the court applies to the construction of the acts granting to private individuals parts of the public domain the rule of strict construction against the grantee and in favor of the public. In these cases there is an application of the rule for which we contend to forfeitures of property as distinct from forfeitures of franchise or license privileges.

In this connection see:

Atlantic and Pacific Railroad Company v. *Mingus*, 165 U. S., 413.

U. S. v. *Oregon & California Railroad Company*, 164 U. S., 526, 41 L. Ed., 541.

this ordinance, to terminate the grant of privileges to said company, provided twelve (12) months' previous notice in writing shall have been given of the intention of the city to take over the property of the grantee, suitable to and used by it for all the purposes of this grant, including the tunnels themselves, and all appurtenances, equipment and fixtures *except the wires, equipment and fixtures necessary to the carrying on of the telephone business,* which wires, equipment and fixtures shall not be subject to city purchase until the expiration of the period named in said ordinance of February 20, 1899, it being the intent and purpose of the City Council that the grant by said ordinance of February 20, 1899, to carry on a telephone business shall continue *unabridged* for the full term of said grant, but that the grant, except as hereinabove provided, of new privileges by this ordinance conferred, including the right to construct tunnels, shall be subject to termination and city purchase as above provided. And in the event that the City Council shall so terminate the grant and take over the tunnels and fixtures as above provided, except such as may be necessary to the carrying on of the telephone business, then such company shall be permitted for the full term of said ordinance of February 20, 1899, to utilize said tunnels to such extent as may be necessary to the carrying on of the telephone business and shall pay for the use of such tunnels a reasonable rental."

By this clause, therefore, it is expressly provided that the City Council might at the end of twenty (20) years, that is, in 1923, buy the tunnel property used for *transportation* purposes and that in spite of such purchase the rights of the company to conduct a *telephone* business should continue for the full grant of the original license or until 1929, a period of some six years after the authorized purchase of the *transportation* property.

The same distinction between *transportation* rights and property on the one hand and *telephone* rights and property on the other hand is recognized in Section 11—the forfeiture section of this amendatory ordinance of

1903. As already noted this section includes separate provisions for the forfeiture of the *transportation* property on certain conditions and the forfeiture of the *telephone* property on certain other conditions and this same distinction is carried through the subsequent amendatory ordinances of February 1st, 1909, and June 28th, 1909, which re-enact Section 11 of the amendatory ordinance of 1903 with only slight, and for this purpose inconsequential changes.

The distinction between the two systems is further emphasized by the fact that these ordinances require the payment of separate and different compensation from each, the *transportation* system being required to pay one scale of percentages on its gross receipts while the *telephone* system is required to pay an entirely different scale of percentages on its gross receipts, thus necessitating the keeping of the business of the two systems distinct.

Conclusion.

In conclusion, therefore, I would state that in my opinion the City of Chicago has the right under the ordinances granted to the Illinois Telephone and Telegraph Company to pass an ordinance declaring a forfeiture of the rights of that company granted under the ordinance of February 20, 1899, and of the plant and equipment for telephone purposes constructed by said company or its successors and assigns under said ordinance or any of the later ordinances amendatory thereof. Such ordinance would at least amount to a declaration of the purpose of the city to declare a forfeiture. Whether or not subsequent court action would be necessary on the part of the city in order to secure possession of the physical property so declared forfeited to the city is a

question upon which I am not at present called upon to pass and which will require further consideration.[13]. In any event, the first step in the proceeding, if this Committee and the Council see fit to enforce the rights of the city in this regard, is to pass such ordinance and then to follow the same up, if need be, by court proceedings.

I have prepared a draft of an ordinance for the purpose of declaring such forfeitures. In the first instance I prepared drafts of two separate ordinances, the one forfeiting the rights of the company to do a telephone business and the second forfeiting its plant and equipment for telephone purposes, but while it is quite possible that such procedure would accomplish the purpose for which it was intended, it has seemed to me on

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[13]In this connection it may be well to call attention to a few cases indicating the method of procedure to procure possession of the property which may be forfeited.

In *The City of Belleville* v. *Citizens' Horse Railway Company*, 152 Ill., 171, upon the failure of the defendant to fulfill the conditions of the ordinance, the city passed an ordinance repealing and revoking the rights and privileges of the railway company. The right of the city to terminate the license to the railway company was upheld but with reference to the right of the city to secure possession of the property of the railway company the court said:

> "The city had no authority *without the judgment of a court* to forfeit to its own use the tracks, switches and turnouts of the railway company. *But there was no attempt to enforce it.* The remaining sections are complete in themselves and so distinct and separately enforcible that they may be enforced without regard to Section 3. They therefore are not invalid." p. 188.

This language implies that the city had the power to enforce a forfeiture by appropriate legal proceedings.

In *People* v. *Central Union Telephone Company*, 232 Ill., 260, the court upheld the rights of the city to terminate the license granted to the defendant to use the streets of the City of Moline for telephone wires. The defendant insisted upon continuing to use the city streets and thereupon *quo warranto* proceedings were brought to oust the telephone company from the use of the streets. It was held that this was a proper form of action to determine the right of the city to declare the forfeiture of the franchise or license and to determine the rights of the defendant to the use of the streets.

The above cases upheld the validity of ordinances passed by the city declaring the termination of the rights and privileges granted to private corporations. They would also indicate that such an ordinance is necessary. *That it is necessary to pass an ordinance declaring the election of the city to forfeit the franchise or license and property as provided by the grant is held by the following two cases:*

> *City of Toledo* v. *Toledo Railway and Light Co.*, 25 Oh. Cir., 441.
> *U. S.* v. *Washington Improvement Co.*, 189 Fed., 674.

In the two cases just cited it was held that the failure to pass such

further consideration that it would be wiser to join in one ordinance the appropriate sections for the forfeiture of the right to do business and for the forfeiture of the plant and equipment for telephone purposes. I do this because the forfeiture clause, Section 11 of the ordinances, provides for the forfeiture to the city of

> "all rights acquired under said ordinance of February 20, 1899, *together with* its plant and equipment for telephone purposes"

In view of the words here used it might be contended that the two forfeitures could not be separated and that a forfeiture of the telephone rights would not be valid without a forfeiture of the plant and equipment. It would seem clear that the plant and equipment could not be forfeited without a forfeiture of the telephone rights.

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an ordinance barred any proceedure in the courts to oust the private companies from the use of the streets and the possession of the property forfeited.

In *Los Angeles Railway Company* v. *City of Los Angeles*, 152 Cal., 242, 92 Pac. Rep., 490, it was held that the provision for forfeiture in the franchise was self-executing without the judgment of the court.

In *New Jersey Street Railway Company* v. *the Inhabitants of South Orange*, 58 N. J. Eq., 83, 43 Atl. Rep., 53, it was held that the ordinance in that case declaring a forfeiture and providing for the sale of the property of the street railway company amounted to a decree of court and was an attempt on the part of the City Council to exercise a judicial function and therefore was void. The facts presented in this case were exceptional in the extent to which the City Council attempted to go providing for a sale of the property, etc., evidently with the idea of precluding any possible judicial proceedings. I do not believe that the objection that the City Council was attempting to exercise judicial functions would be held to invalidate an ordinance such as it is here proposed to pass in the case of the Automatic Telephone Company.

In the case of *Wheeling & E. G. R. Co.* v. *Triadelphia*, 4 L. R. A. (N. S.), 321, it was held that this objection to the ordinance there under discussion could not be sustained. The court said at page 331:

> "The Legislature of the State in declaring a forfeiture performs exactly the same function that the Council performs in this case. It necessarily ascertains the existence of a cause of forfeiture. An individual in declaring the forfeiture of a contract right does the same thing. But no court has ever regarded such declaration in either case as an adjudication. Nor do they so regard such declarations made by municipal councils."

And again at page 332:

> "Plainly this means that the forfeiture is effective only in such case just as such a declaration by an individual is effective when he has the right to make it, and therefore has none of the efficacy of a judicial determination."

See also

Myrick v. *Brawley*, 33 Minn., 377.

Under these circumstances it has seemed to me wiser to join both forfeitures in one ordinance so as to prevent the possibility of the City Council passing one of the two ordinances and failing to pass the other, thus resulting in a situation which might lead to complications in the courts. I have embodied in the ordinance the familiar clause to the effect that the invalidity of any one section should not affect the validity of the other sections, so that even if it be assumed that the right of the city to forfeit the plant and equipment is not as clear as its right to forfeit the telephone franchise and that the section attempting to forfeit the property would not be sustained, such adverse decision of the courts as to this one section would not, I believe, affect the validity of the other clauses forfeiting the right to do a telephone business. This is the rule announced by the Supreme Court of this state in *City of Belleville* v. *Citizens Co.*, 152 Ill., 171, cited at length in note 13. If this is so there seems to be no possible objection to joining the two forfeitures in one ordinance and there are very evident advantages in so doing.

I submit in connection with this opinion the draft of such an ordinance as is above referred to declaring the forfeiture of both the right to do business and the plant and equipment for telephone purposes.

Respectfully submitted,

STEPHEN A. FOSTER.

ADDENDUM.

In the above opinion I naturally attempted to deal particularly with such considerations as had been urged by counsel in their objections to the power of the City to forfeit the telephone rights and property of the Tunnel Company. After my opinion was read to your Committee it was suggested that there might be a distinction between a case involving forfeiture of rights and property for failure on the part of a company to comply with certain conditions as to operation and a case where the company had abandoned all efforts to comply with the terms of its ordinance. As a matter of fact it appears that a number of the cases cited deal with the former situation and sustain forfeitures for a failure to comply with conditions of the ordinance,[14] but in view of the sug-

[14]In *People* v. *Central Union Telephone Co.*, 232 Ill., 260, the forfeiture of the Telephone Company's rights in the streets of Moline was based upon the failure of the Company to comply with the terms of the ordinance as to the manner of placing the poles and hanging the wires. In this case the City brought *quo warranto* proceedings which were held to be proper. But the point to which I here call attention is that there was no pretense that there had been any general abandonment of the Company's franchise or any suggestion on its part that it would cease to do business in Moline. This case is of particular importance as recognizing the right of forfeiture by *quo warranto* proceedings even where there is no express reservation of the right to repeal the ordinance or terminate the contract and holding *that where there is an express reservation forfeiture can be declared even though the unfulfilled conditions were not of vital importance.* The court said at page 277:

> "When parties have agreed that one of them shall have an option to terminate the contract if certain of its terms are not observed the party may exercise his option upon the failure to comply with any such terms and *if he elects to treat the contract as at an end it will be discharged whether the term is vital to the contract or not,* but when there is a failure to comply with some term of a contract and there is *no agreement* that the breach of that term shall operate as a discharge, it is always a question for the courts to determine whether or not the default is in a matter which is vital to the contract."

And the court held that the conditions as to the manner of placing the poles and hanging the wires were "vital to the contract" and so justified a forfeiture of the Company's rights even though there was no express reservation to that effect in the ordinance.

In the case of *Wheeling & E. G. R.* v. *Triadelphia*, 4 L. R. A. (N. S.),

gestion that the Chicago Tunnel Company in its telephone as well as in its transportation system is a going concern and still attempting to comply with all the terms and conditions of the ordinances under which it is operating, it seems to me wise to add to my opinion some brief considerations of the facts that bear upon this situation.

The Tunnel Company has in Effect Abandoned Its Effort to Comply with the Requirements of Its Ordinances.

It would seem to me that a fair consideration of the facts will lead to the conclusion that the Chicago Tunnel Company has in effect already abandoned all effort to comply with the terms of the ordinances and that we

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321, the court reached the same conclusion that a failure to comply with conditions of an ordinance, especially where those conditions are expressed in the contract, would justify forfeiture of the company's rights and the failure of the Street Railway Company to lay planks of prescribed dimensions along the rails of its track was held to be a sufficient ground for forfeiting the ordinance in view of the fact that the ordinance contained an express clause giving the right to forfeit for such cause. The court said at page 333:

> "The authorities relied upon to sustain the position that substantial compliance with conditions, the violation of which is expressly made ground of forfeiture, do not support that view. They are all cases in which the ordinances did not say failure to comply with certain specific conditions, the conditions there in question, should result in forfeiture of the privilege granted. There was no such stipulation in the act construed by the court of appeals of New York in *People* v. *Broadway R. Co.*, 126 N. Y., 29, 26 N. E., 961. The propositions asserted in Booth on Street Railways, Section 45, are inapplicable for the same reason. At Section 46 of the same work it is said: '*But if the statute provides that upon such failure the franchise shall "be terminated" or shall "cease," the default will put an end to the franchise without judicial proceedings*, and the legislature may confer the franchise upon any other company or person.' And this is fully sustained by the following decisions cited in support of it: *Re Brooklyn, W. M. R. Co.*, 72 N. Y., 245, 75 N. Y., 335; *Brooklyn Steam Transit Co.* v. *Brooklyn*, 78 N. Y., 524; *Oakland R. Co.* v. *Oakland, B. & F. V. R. Co.*, 45 Cal., 365, 13 Am. Rep., 181."

And again on page 334:

> "In the absence of the stipulation for forfeiture as to the conditions not complied with here, it could be held, consistently with all authority, that there has been a substantial compliance with the contract as a whole, and, therefore, no cause of forfeiture. *But it is competent for the parties to make any condition a material and essential part of the contract. As these parties have*

therefore have presented in this case a situation where a forfeiture, if made, would be of rights and property, not merely because of a *past* failure to comply with the requirements of the ordinances, but also because of the company's practical admission of its *inability to comply with them in the future.* As I read the briefs filed on behalf of the Tunnel Company, it would seem to me clear that the company does not contemplate any attempt in the future to comply with the terms of the ordinance requiring it to have 20,000 *bona fide* subscribers. It says

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done so, how can the court deny to one of them the benefit of the contract, or relieve the other from its obligation? A distinction between conditions precedent and conditions subsequent is made by the courts. The condition in this case belongs to the latter class, but the distinction does not seem to relieve the company. In the former class, no declaration or adjudication of forfeiture is necessary, but in the latter it is, since non-compliance may be waived. *Hobelman* v. *Kansas City Horse R. Co.*, 79 Mo., 632; *Chicago* v. *Chicago & W. I. R. Co.*, 105 Ill., 73, 78."

In *Palestine Water & Power Company* v. *Palestine*, 40 L. R. A., 203, it was held that the fact that the Water Company came forward after the proceedings for forfeiture were instituted and offered to perform its contract did not deprive the City of the right to insist upon a forfeiture. At page 208 the court said:

"* * * In this case the Water Company did not mend its ways nor offer to do so until after the suit had been brought, and we think that, under the circumstances, the trial court did not abuse its discretion, *if, indeed, it had any discretion in the matter*, by refusing to extend the time of performance."

The court also used significant language concerning the contentions made by bondholders of the company, which language is applicable to the situation presented to this Committee. The court said at page 208:

"* * * To revoke the franchise which the Water Company had so flagrantly abused is a harsh remedy, and may cause loss to fall upon those who hold the bonds, but it is the only adequate means by which a city can surely protect itself against such wrongs as were practiced in this case. Bondholders of such corporations are entitled to protection to the extent that the corporations perform their duties under the law, but they take such bonds with the knowledge that the continuance of the charter rights and other franchises granted to corporations depends upon their faithful performance of the duties to the public for which they were created."

On the authority of these and other cases it seems to me clear that the power of the City to forfeit the rights and property of the Chicago Tunnel Company for a non-compliance with the express terms of its ordinances would not be denied, even if as suggested it should appear that the Chicago Tunnel Company was trying in good faith to comply with all of the requirements, but had been unable to meet the strict letter of these forfeiture clauses. However, as stated in the body of this opinion, I do not find that the Chicago Tunnel Company is in fact making this attempt. For both of these reasons this doctrine of "substantial compliance" has in my opinion no application to the facts presented to this Committee.

frankly that it cannot compete with the Chicago Telephone Company. At page 14 of the statement filed by its counsel on the "Consequences of a Declaration of Forfeiture" it is stated that the experiment of competing with the Chicago Telephone Company *"has been tried,"* and at the bottom of page 16, it is stated that *"the Chicago Telephone Company * * * has already pushed the Automatic Telephone Company to the wall."* And similar expressions are to be found throughout the briefs filed on behalf of the company and its bondholders.

THE CHICAGO TUNNEL COMPANY BY ITS AGREEMENT TO SELL OUT TO THE BELL INTERESTS VIOLATED THE TERMS OF THE 1899 ORDINANCE AND RENDERED COMPETITION INOPERATVIE.

It is to be noted that the rights of forfeiture provided in the final paragraph of Section 2 of the original ordinance of February 20, 1899, have at all times been carefully preserved by the subsequent ordinances. The ordinance of June 20th, 1903, which was amendatory to the ordinance passed five days earlier on July 15th, 1903, contained this provision:

> "Provided, however, that nothing herein contained shall impair the obligation of said company under said ordinance of February 20, 1899, to construct and have in operation within five (5) years from the date of said ordinance of February 20, 1899, a telephone exchange serving two thousand (2,000) telephones *or shall vary the provisions of forfeiture therein contained.*"

The subsequent ordinances of February 1st, 1909, and June 28, 1909, contained substantially the same words with the additional clause "except as herein expressly provided" added to the proviso. I do not find anything "expressly provided" in either of these later ordinances that can be construed as diminishing the rights of the

City to declare a forfeiture under the last paragraph of Section 2 of the original ordinance of February 20, 1899, which reads as follows:

> "It shall be expressly the condition of this grant that if the Illinois Telephone and Telegraph Company or any of its successors or assigns shall either sell out to or *enter into any agreement* with any existing telephone company or any of its successors or assigns doing business in the City of Chicago, *which agreement would tend to make competition inoperative,* this ordinance shall become null and void and the plant of said company together with the conduits, wires and poles then in the streets belonging to said company shall be forfeited to the City."

As is well known to your Committee, the Chicago Tunnel Company did on the 8th day of July, 1913, according to the papers submitted, enter into an agreement to sell, and the American Telephone and Telegraph Company, by said agreement agreed to purchase, for the sum of $6,300,000 the telephone plant, etc., of the Chicago Tunnel Company. This agreement was subsequently modified by memorandum agreement dated October ....., 1913, and by letter of October 20, 1913, addressed to the American Telephone and Telegraph Company by the Chicago Tunnel Company. This last letter specifically mentions the Chicago Telephone Company as a possible purchaser of the Chicago Tunnel Company's property under the previous agreements with the American Telephone and Telegraph Company, and the supplemental memorandum agreement of July 8, 1913, also specifically refers to the Chicago Telephone Company and the right which the American Telephone and Telegraph Company was to secure to construct and connect conduits between the tunnels of the Tunnel Company and the conduit system of the Chicago Telephone Company. It is, of course, common knowledge that the American Telephone and Telegraph Company owns a very

large percentage—in the neighborhood of 95%—of the stock of the Chicago Telephone Company and that the latter is one of the subsidiary companies of the Bell system of which the American Telephone and Telegraph Company is the parent company.

Your Committee are familiar with the terms of the proposed ordinance submitted to the City Council on or about July 14, 1913, and amending at one and the same time the aforesaid ordinances of the Chicago Tunnel Company and the ordinance of the Chicago Telephone Company passed November 6, 1907, so as to permit the sale by the Chicago Tunnel Company of its telephone plant and equipment to the Chicago Telephone Company. It is to be noted that this proposed ordinance introduced on behalf of the parties seeking to effect this sale re-enacted Section 2 of the original ordinance of February 20, 1899, but omitted at the end thereof the important provision above quoted concerning the right of forfeiture, and that this proposed ordinance further provided in Section 3 thereof that the Chicago Telephone Company should hold and operate the telephone plant of the Tunnel Company "free from all the conditions, provisions, forfeitures and requirements imposed by the terms of the ordinances adopted by the City Council of the City of Chicago on February 20, 1899, and July 15, 1903, together with all amendments thereto and all ordinances or parts of ordinances in conflict" with said proposed ordinance. So that this proposed ordinance if passed would have wiped out the forfeiture clauses of the 1899 ordinance and the forfeiture clauses of the 1903 and subsequent ordinances so far as the same applies to the telephone rights, plant or equipment of the Chicago Tunnel Company.

The question arises for consideration whether or not the Chicago Tunnel Company did not, by making the

above mentioned contracts with the American Telephone and Telegraph Company, the purpose of which is made clear by the proposed ordinance submitted to the City Council, violate the terms of the forfeiture clause above set forth in the original ordinance of February 20, 1899. I am of the opinion that the Chicago Tunnel Company entered into an agreement with an existing telephone company doing business in the City of Chicago, which agreement tended to make competition inoperative. I have every reason to believe that the American Telephone and Telegraph Company itself was doing business in the City of Chicago on the date of its agreement with the Chicago Tunnel Company—that is the 8th day of July, 1913—and in reality, as appears from a consideration of the contracts and the proposed ordinance taken together, the real purchaser of the Chicago Tunnel Company's property was to be the Chicago Telephone Company, which last named company, of course, was doing business in the City of Chicago at that time. *That this agreement "would tend to make competition inoperative" is self-evident.* As soon as the Chicago Tunnel Company secured a contract for the sale by it of its property to the Chicago Telephone Company the *"tendency"* of such contract would be to diminish any desire on the part of the Chicago Tunnel Company to push its efforts to compete successfully with the Chicago Telephone Company. It is not necessary to find that all competition ceased. It is enough, under the terms of the 1899 ordinance, to find that there was a *"tendency"* to make competition inoperative.

Conclusion.

It would therefore seem to me that the case presented to this Committee is not one of a going concern seeking to carry out all of the terms and conditions of the ordinances and to comply with the obligations thereby imposed but rather a case of a company which has in effect abandoned all effort to comply with the terms of the ordinances, has admitted the failure of its telephone undertaking and has definitely abandoned the purpose for which its original ordinance was granted—that is, the securing of telephone competition in the City of Chicago.

In view of these considerations and the emphasis that is placed by some upon the alleged fact that the telephone system of the Tunnel Company is a going concern it seems to me desirable to incorporate in the ordinance to be submitted to your Committee appropriate paragraphs concerning the failure of the Tunnel Company to comply with the terms of the ordinance of February 20, 1899, and concerning its practical abandonment in the particulars above named, of all effort to comply with that and the other amendatory ordinances relating to its telephone business. The draft of an ordinance submitted herewith will be found to contain such provisions.

Respectfully submitted,

Stephen A. Foster.

Draft of Ordinance.

Draft of

An Ordinance declaring the forfeiture of all rights acquired by the Illinois Telephone and Telegraph Company or any of its successors or assigns, or the Chicago Tunnel Company, or any other company or person, under the ordinance passed by the City Council on February 20, 1899, together with the plant and equipment for telephone purposes constructed by said Illinois Telephone and Telegraph Company or any of its successors or assigns, or the Chicago Tunnel Company or any other company or person, under said ordinance passed February 20, 1899, or any ordinance amendatory thereof.

Whereas, on February 20, 1899, an ordinance was passed by the City Council of the City of Chicago in and by which permission and authority were granted to the Illinois Telephone and Telegraph Company (a corporation formerly existing under the laws of Illinois) its assigns and lessees, upon the terms and conditions in said ordinance set forth, to construct, maintain, repair and operate in the streets, avenues, alleys and tunnels and other public places in the City of Chicago, and under the Chicago river and its several branches for and during the term of thirty (30) years from the passage of said ordinance a line or lines of conduits and wires, or other electrical conductors, together with all necessary feeders and service wires, or other electrical conductors, to be used for the transmission of sound, signals and intelligence, by means of electricity or otherwise; and,

Whereas, it was provided, among other things, in and by said ordinance that if said Illinois Telephone and Telegraph Company, or any of its successors or assigns, should either sell out to or enter into any agreement with any existing telephone company or any of its successors or assigns doing business in the City of Chicago, which

agreement would tend to make competition inoperative, said ordinance should become null and void, and the plant of said company, together with the conduits, wires and poles then in the streets belonging to said company should be forfeited to said City of Chicago; and,

Whereas, on July 15, 1903, an ordinance was passed by the said City Council in and by which permission and authority were granted to said Illinois Telephone and Telegraph Company, its successors and assigns, upon the terms and conditions in said ordinance set forth to construct, maintain, repair and operate in and through tunnels which had theretofore been constructed by said Illinois Telephone and Telegraph Company claiming to act under the authority of the aforesaid ordinance of February 20, 1899, or should thereafter be constructed under said ordinance of July 15, 1903, or under said ordinance of February 20, 1899, for and during the term of said ordinance of February 20, 1899, not only wires and electrical conductors as provided in said last mentioned ordinance, but also any appliance or apparatus for the transmission and transportation of newspapers, mail matter, packages, parcels or merchandise; and

Whereas, on July 20, 1903, an ordinance was passed by said City Council amending said ordinance of July 15, 1903, by inserting at the end of Section 11 thereof a proviso to the effect that nothing therein contained should impair the obligation of said Illinois Telephone & Telegraph Company under said ordinance of February 20, 1899, to construct and have in operation within five years from the date of said ordinance of February 20, 1899, a telephone exchange serving two thousand telephones or should vary the provisions of forfeiture therein contained; and

Whereas, on June 28, 1909, an ordinance was passed

by the City Council of the City of Chicago amending the aforesaid ordinance passed July 15, 1903, and the ordinance amendatory thereof passed July 20, 1903, and the ordinance amendatory thereof passed February 1, 1909; and,

WHEREAS, in and by said ordinance passed June 28, 1909, it was and is, among other things, provided, that if said Illinois Telephone and Telegraph Company, its successors and assigns, shall fail to construct, equip and install a telephone system under the terms of said ordinance to said company of February 20, 1899, adequate for the services of 20,000 subscribers prior to June 1st, 1911, or if at any time after said June 1st, 1911, said company, its successors and assigns shall not have in operation or shall cease to operate a telephone system serving 20,000 bona fide subscribers, then and in each such case said company, its successors and assigns, shall forfeit to the City of Chicago, or to any licensee or grantee of said City (designated or authorized by the City for this purpose), all rights acquired under said ordinance of February 20, 1899, together with its plant and equipment for telephone purposes, and shall forthwith turn over the ownership and possesion of said plant and equipment to said City, or to any licensee or grantee of the City (designated or authorized by the City for this purpose), and shall be under obligations to furnish said City, or to any licensee or grantee of the City (designated or authorized by the City for this purpose) without charge, all space in any or all of its tunnels and conduits necessary for the carrying on of said telephone business; such space at no time to be less than that required to reasonably accommodate equipment for the service of 20,000 telephone subscribers; and,

WHEREAS, in and by said ordinance passed June 28,

1909, it was expressly provided that nothing therein contained should impair the obligation of said Illinois Telephone and Telegraph Company under said ordinance of February 20, 1899, to construct and have in operation within five years from the date of said ordinance of February 20, 1899, a telephone exchange serving two thousand telephones, or should vary the provisions of forfeiture therein contained except as was expressly provided in said ordinance of June 28, 1909; and,

Whereas, by the several reservations in said ordinances of July 20, 1903, and of June 28, 1909, the right of forfeiture above set forth on the conditions above stated reserved in said ordinance of February 20, 1899, has been expressly reserved and continued in full force; and,

Whereas, each of said ordinances was duly accepted in writing by said Illinois Telephone and Telegraph Company and such acceptance duly filed in the office of the City Clerk of the City of Chicago in accordance with the terms and within the time limited by said ordinances respectively; and,

Whereas, the Chicago Tunnel Company has succeeded to and acquired all rights granted or acquired under the aforesaid ordinance of February 20, 1899, subject to all the terms and conditions contained in said ordinance and the aforesaid ordinances amendatory thereof, together with the aforesaid plant and equipment for telephone purposes; and,

Whereas, said Chicago Tunnel Company did on or about the 8th day of July, 1913, enter into an agreement with the American Telephone and Telegraph Company, a New York corporation engaged in the telephone business and at that time and for more than fifteen years prior thereto doing business in the City of Chicago and

owning a large majority of the stock of and controlling the Chicago Telephone Company, a telephone company at that time and for more than fifteen years prior thereto doing business in the City of Chicago, by which agreement said Chicago Tunnel Company agreed to sell to said American Telephone and Telegraph Company and said American Telephone and Telegraph Company agreed to purchase the telephone plant, system and equipment including all of the property of said Chicago Tunnel Company necessary and suitable to and used by it for carrying on the telephone business in the City of Chicago, under certain terms and conditions in said agreement named, which agreement tended to make competition between said Chicago Tunnel Company and the aforesaid telephone companies inoperative; and,

WHEREAS, said agreement of July 8, 1913, was subsequently modified by memorandum agreement supplemental thereto dated on or about the ..... day of October, 1913, and by a letter of the Chicago Tunnel Company dated on or about October 20th, 1913, addressed to said American Telephone and Telegraph Company and expressly providing that in the event that the purchaser of all or a part of the property above referred to should be the Chicago Telephone Company, the Chicago Tunnel Company would grant to said Chicago Telephone Company certain rights to occupy without charge for telephone purposes space in the tunnels of said Chicago Tunnel Company; and,

WHEREAS said Chicago Tunnel Company submitted to the City Council on or about July 14, 1913, an ordinance amendatory of the aforesaid ordinance passed by the City Council on February 20, 1899 (and the ordinances amendatory thereof), and amendatory also of an ordinance passed November 6, 1907, granting to the Chicago

Telephone Company permission and authority to construct, maintain, repair and operate in and under the public streets, alleys and other public places in the City of Chicago and under the Chicago river and its several branches, a system of wires, cable, electrical conductors, poles and conduits, for the transmission of sounds and signals only by means of electricity, and said proposed ordinance so introduced provided that permission and authority were thereby granted to said Chicago Tunnel Company to sell its telephone plant, system and equipment, including all the property of said Chicago Tunnel Company, necessary and suitable to and used by it for carrying on the telephone business in the City of Chicago and provided further that said Chicago Telephone Company might become the purchaser thereof and purported to grant to said Chicago Telephone Company permission and authority to purchase such telephone plant, system and equipment of said Chicago Tunnel Company and to hold, extend, maintain and operate the same in connection with its own telephone plant and under the terms of its own ordinances from the City of Chicago and free from all of the conditions, provisions, forfeitures and requirements imposed by the terms of the ordinances adopted by the City Council of the City of Chicago on February 20, 1899, and July 15, 1903, together with all amendments thereto and all ordinances or parts of ordinances in conflict with said proposed ordinance and said proposed ordinance further provided upon the completion of any sale and purchase provided for in said ordinance for the repeal of the right of said Chicago Tunnel Company, its successors and assigns to build, maintain and operate a telephone plant under the provisions of the ordinances of February 20, 1899, and July 15, 1903, and all ordinances amendatory thereof, pro-

vided that such repeal should not affect its or their rights to operate and maintain otherwise than in conducting a telephone system any tunnels or conduits constructed under said ordinance of February 20, 1899, then used as a part of said tunnel system; and,

WHEREAS, the counsel of said Chicago Tunnel Company acting on its behalf in the matter of the aforesaid proposed ordinance then pending before the City Council presented to the Committee on Gas, Oil and Electric Light of said City Council a statement dated December 3, 1914, and addressed to said Committee expressly admitting that the number of bona fide subscribers of the telephone system of said Chicago Tunnel Company was on said date less than 20,000, and also admitting that the company had terminated its active campaign of solicitation of subscribers and admitting its inability to comply with the terms and conditions imposed upon it under the ordinances passed by the City Council as aforesaid; and,

WHEREAS said Chicago Tunnel Company has by the statements submitted on its behalf as aforesaid and by its conduct in entering into the aforesaid agreements with the American Telephone and Telegraph Company and by seeking authority from the City of Chicago as aforesaid under its proposed ordinance (which has not been granted) to sell its property to the Chicago Telephone Company, declared its inability to conduct a telephone business in the City of Chicago in competition with the Chicago Telephone Company; and,

WHEREAS, on October 5, 1914, the City Council passed an order directing the Commissioner of Public Service to institute an investigation to determine whether the Chicago Tunnel Company had a telephone system in operation in the City of Chicago serving 20,000 bona fide subscribers and pursuant to the terms of said order said

Commissioner of Public Service made a thorough investigation of the number of bona fide telephone subscribers being served by the telephone system of said Chicago Tunnel Company, and made a count of the same and thereafter, on to wit: the ..... day of February, 1915, submitted his report of said count and investigation in and by which report said Commissioner of Public Service found and reported that said telephone system of said Chicago Tunnel Company was not serving 20,000 bona fide subscribers, and,

WHEREAS, said Chicago Tunnel Company (and all other corporations or individuals interested or claiming to be interested in said telephone system or its plant and equipment and seeking an opportunity to appear and be heard) have been given full and extended hearings before the Committee on Gas, Oil & Electric Light during the many months that said proposed ordinance submitted by said Chicago Tunnel Company has been pending and the proposed forfeiture of the rights and telephone plant and equipment of said company has been under discussion as aforesaid; NOW THEREFORE

Be it Ordained by the City Council of the City of Chicago:

Section 1. That the City of Chicago does hereby declare that neither said Illinois Telephone and Telegraph Company nor said Chicago Tunnel Company nor any company or person operating a telephone system in the City of Chicago under said ordinance of February 20, 1899, now has in operation a telephone system serving 20,000 bona fide subscribers; and that the telephone system established by said Illinois Telephone and Telegraph Company and its successors is not now serving 20,000 bona fide subscribers and for a long period of time im-

mediately preceding the date of the passage of this ordinance and subsequent to June 1st, 1911, has not been serving 20,000 bona fide subscribers and that said Chicago Tunnel Company has since it succeeded to the rights of said Illinois Telephone and Telegraph Company ceased to operate either directly or indirectly a telephone system serving 20,000 bona fide subscribers and is not now operating either directly or indirectly a telephone system serving 20,000 bona fide subscribers, and that said Illinois Telephone and Telegraph Company and said Chicago Tunnel Company have in so doing violated the terms and conditions of the aforesaid ordinances and the obligations imposed thereby upon them as aforesaid.

Section 2. That the City of Chicago does hereby declare that said Chicago Tunnel Company has also failed to perform and has violated the terms of said ordinance of February 20, 1899 and aforesaid ordinances amendatory thereof in that said Chicago Tunnel Company has entered into an agreement as aforesaid with a telephone company doing business in Chicago as aforesaid, which agreement has tended to make competition inoperative and that said Chicago Tunnel Company in this and other ways as aforesaid has in effect abandoned its efforts to comply with the obligations resting upon it under the terms and conditions of the aforesaid ordinances.

Section 3. That the City of Chicago does hereby declare that all rights acquired by the Illinois Telephone and Telegraph Company, or any of its successors or assigns, or the Chicago Tunnel Company, or any other company or person under the ordinance passed by the City Council of the City of Chicago on February 20, 1899, have become and are subject to forfeiture; and that the City of Chicago does hereby elect to determine and forfeit all of the rights granted by said ordinance of February 20, 1899, and all rights acquired under said ordi-

nance of February 20, 1899, by the said Illinois Telephone and Telegraph Company, or any of its successors or assigns, or the Chicago Tunnel Company, or any other company or person; and that the City of Chicago does hereby declare forfeited all rights granted by said ordinance of February 20, 1899, and all rights acquired by the said Illinois Telephone and Telegraph Company, or any of its successors or assigns, or the Chicago Tunnel Company, or any other company or person, under said ordinance of February 20, 1899, and all said rights are hereby terminated and forfeited to the City of Chicago.

Section 4. That the City of Chicago does hereby declare that the plant and equipment for telephone purposes constructed or installed by said Illinois Telephone and Telegraph Company, or any of its successors or assigns, or the Chicago Tunnel Company, or any other corporation or person, under the aforesaid ordinance passed by the City Council of the City of Chicago on February 20, 1899, or any of the aforesaid ordinances supplemental thereto or amendatory thereof, have become and are subject to forfeiture; and that the City of Chicago does hereby elect to forfeit said plant and equipment; and that the City of Chicago does hereby declare said plant and equipment for telephone purposes to be forfeited to it, the City of Chicago.

Section 5. That the City of Chicago does hereby demand of said Chicago Tunnel Company and of the Illinois Telephone and Telegraph Company, a corporation organized under the laws of the State of Illinois on or about June 6, 1912, and of any and all companies or persons now having or claiming any interest in or ownership of or being in possession of said plant and equipment so constructed, or any part or portion thereof, that they and each of them forthwith turn over to the City of

Chicago the ownership and possession of said plant and equipment, or such part or portion thereof as they respectively have or claim any interest in or ownership of, or are in possession of, and the Commissioner of Public Works of the City of Chicago is hereby designated and authorized to receive and receipt for the same as the representative of, and for and on behalf of, the City of Chicago.

Section 6. That the City of Chicago does hereby demand of said Chicago Tunnel Company and said Illinois Telephone and Telegraph Company, which was organized on or about June 6, 1912, and any and all other companies or persons now having or claiming any interest in or ownership of or being in possession of the tunnels and conduits constructed by the aforesaid Illinois Telephone & Telegraph Company (a formerly existing corporation) claiming to act under the authority of the aforesaid ordinance of February 20, 1899, or under said ordinance of July 15, 1903, or said ordinances amendatory thereof, that they or either of them, upon the turning over of the ownership and possession of such plant and equipment for telephone purposes to the City, furnish the City of Chicago or any licensee or grantee of the said City (that may be designated or authorized by the City for this purpose) without charge, all space in any or all of said tunnels and conduits necessary for the carrying on of said telephone business; such space at no time to be less than that required to reasonably accommodate equipment for the service of 20,000 telephone subscribers.

Section 7. That the Commissioner of Public Works of the City of Chicago be and he is hereby authorized and directed to deliver or cause to be delivered a duly certified copy or copies of this ordinance to the said Chicago Tunnel Company and the said Illinois Telephone and

Telegraph Company, which was organized on or about June 6, 1912, and to any and all other companies or persons, if any known to him, now having or claiming any interest in or ownership of or being in possession of said plant and equipment or any part or portion thereof.

Section 8. That the Corporation Counsel of the City of Chicago be and he is hereby authorized and directed to take such action as he may deem proper and advisable to enforce the forfeiture declared in Section 2 and to enforce the forfeiture of said plant and equipment declared in Section 4 of this ordinance, and to enforce the rights of the City of Chicago in the premises and the right of the City of Chicago to all space in the aforesaid tunnels and conduits necessary for the carrying on of said telephone business.

Section 9. That the invalidity of any portion of this ordinance shall not affect the validity of any other portion thereof which can be given effect without such invalid part.

Section 10. This ordinance shall take effect and be in force from and after its passage and due publication.